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SUPREME COURT, U.S.

NO. 80-5693

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MURRIEL DON CRAWFORD, JR.,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE JUSTICES OF SAID COURT:

COMES Petitioner who supplements his original Petition filed herein by bringing to this Court's attention the opinion on his second Motion for Rehearing delivered by the Texas Court of Criminal Appeals on April 15, 1981, in its Cause No. 57,602. Again, the conviction was affirmed, three Judges dissenting. Such opinion is incorporated herein as Exhibit A.

Rendition of such opinion does not alter or diminish the questions presented for review by the Petition for Certiorari filed herein.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays, as before, the issuance of a writ of certiorari to the Texas Court of Criminal Appeals to review this case for the reasons set forth in his Petition, and that this Court reverse Petitioner's conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that a copy of the above and foregoing Supplemental Petition for Writ of Certiorari has been mailed to the Honorable Mark White, Attorney General of the State of Texas, on this the 27 day of April, 1981.

EXHIBIT A

MURRIEL CRAWFORD, JR., Appellant

NO. 57,602 v. - - - Appeal from POTTER County

THE STATE OF TEXAS, Appellee

OPINION ON APPELLANT'S MOTION FOR REHEARING

Appeal is taken from a conviction for capital murder. Following his plea of guilty, the court instructed the jury to return a verdict of guilty. The jury then answered "yes" to the first two questions under Art. 37.071(b) and punishment was assessed at death.

Appellant contends the court erred in sustaining the State's challenge for cause to prospective juror Matha Stulce. The record reflects that the State's challenge was based upon V.T.C.A. Penal Code, Sec. 12.31(b).[1] On original submission, it was held that appellant's failure to object to the alleged improper exclusion of Stulce waived the error for purposes of appeal.

This Court has consistently held that the failure to object to the improper exclusion of a prospective juror in a capital murder trial, waives the error for purposes of appeal.[2] In Boulware v. State, 542 S.W.2d 677, this Court stated the following:

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[1] That statute provides as follows:
"Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

[2] See White v. State, 610 S.W.2d 504; Brandon v. State, 599 S.W.2d 567; Russell v. State, 598 S.W.2d 238; Esquivel v. State, 595 S.W.2d 516; Burks v. State, 583 S.W.2d 389; Earvin v. State, 582 S.W.2d 794; Von Byrd v. State, 569 S.W.2d 883; Hughes v. State, 562 S.W.2d 857; Hovila v. State, 562 S.W.2d 243; Burns v. State, 556 S.W.2d 270; Shippy v. State, 556 S.W.2d 246; Granviel v. State, 552 S.W.2d 107; Boulware v. State, 542 S.W.2d 677.

> "In view of the recent decisions of the Supreme Court of the United States that a constitutional guarantee may be waived by a defendant's counsel for the failure to object such as to the improper organization of a grand jury at the trial level and our decisions above discussed on waiver, we hold that the failure to object to the improper exclusion of a venire member waives that right and it cannot be considered on appeal. Hovila v. State, [532 S.W.2d 293] and all cases insofar as they hold to the contrary are overruled. See also Tezeno v. State, [484 S.W.2d 374].
>
> "We hold that, absent an objection, the trial court did not err in excusing the jurors, Hurse and Holt, even though they were not questioned as thoroughly as they might have been with reference to their ability to render the death penalty no matter what the trial may reveal." Id. at 682 and 683.

The Supreme Court of California recently considered similar issues in People v. Velasquez, 606 P.2d 341 (Cal. 1980) and People v. Lanphear, 608 P.2d 689 (Cal. 1980). In those cases, the defendants were convicted of murder and sentenced to death. The convictions were reversed on appeal after the Court concluded that prospective jurors had been excused in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). The Court rejected the State's contention that the defendants' failure to object to the excusal of the jurors waived the Witherspoon error. The State then appealed and in California v. Velasquez, 448 U.S. ___, 100 S.Ct. 3042 (1980) and California v. Lanphear, 448 U.S. ___, 101 S.Ct. 57 (1980), the Supreme Court of the United States vacated and remanded the causes for further consideration in light of Adams v. Texas, 448 U.S. ___, 100 S.Ct. 2521 (1980).

In Adams, the Supreme Court recited the factual setting of the case in tne following manner, "[o]n the State's submission and over petitioner's objections, the trial judge excused a number of prospective jurors who were unwilling or unable to take the Sec. 12.31(b) oath." (Emphasis is added). The Court ultimately concluded that Sec. 12.31(b), supra, had been applied in Adams' trial to exclude prospective jurors on grounds impermissible under Witherspoon.

Appellant urges that his failure to object to Stulce's exclusion on April 12, 1977, should be excused in light of the fact that Adams v. Texas, supra, was not decided until June 25, 1980. This Court has previously held that where a defect of constitutional magnitude has not been established at the time of trial, the failure of counsel to object does not constitute waiver. Ex Parte Sanders, 588 S.W.2d 383; Ex Parte Casarez, 508 S.W.2d 620; Ex Parte Taylor, 484 S.W.2d 748. Such a holding is bottomed on the premise that there was no tactical or logical reason for counsel's failure to object other than the fact that the defect had not been established at the time of trial.

In order for this Court to excuse appellant's failure to object to Stulce's exclusion, we would be required to assume that the prospective juror was acceptable to appellant in every respect and negate the possibility that appellant looked with favor on the court's action in excusing the venireman. Such an assumption would further require speculation that appellant would not challenge her for cause under Art. 35.16, V.A.C.C.P., and that he found Stulce's age, sex, race, occupation, religious preference, marital status, prior jury service etc., acceptable to the extent that he would not have used a peremptory strike against her. Even if we speculate that appellant would not have challenged Stulce for cause or exercised a peremptory challenge on her, we cannot assume that he would have desired to have her as one of the twelve jurors (from the entire panel) who was to render a verdict in his case. We cannot conclude that the only reason appellant failed to object to the exclusion of Stulce was the as yet unestablished defect as found in Adams v. Texas, supra.

We therefore find that appellant may not complain of the exclusion of prospective juror Stulce for the first time on appeal. The appellant's motion for rehearing is denied.

TOM G. DAVIS, Judge

(Delivered April 15, 1981)

EN BANC
Roberts, J., dissents for reasons given in his dissenting opinion on original submission.

MURRIEL CRAWFORD, JR., Appellant

NO. 57,602 v. - - - Appeal from POTTER County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION ON
APPELLANT'S MOTION FOR REHEARING

The Supreme Court of the United States has now made explicit the fact that Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770, (1968) [1] and its progeny, [2] have drawn the outer limit beyond which the State has no "valid" or "legitimate interest" in excluding prospective jurors for cause, on account of their "feelings," "views," "beliefs," or "opinions" about the death penalty. [3] Adams v. Texas, ____U.S.____, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). [Hereinafter, Adams.]

According to the Court, "Witherspoon. . . is a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide

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1/ Hereinafter Witherspoon.

2/ Specifically, Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); and Adams v. Texas, infra.

3/ Indeed, the Supreme Court made short shrift of the argument that V.T.C.A. Penal Code, §12.31(b), is a "separate" cause for exclusion, distinct from the interests advanced by the Witherspoon doctrine:

> "Unlike grounds for exclusion having nothing to do with capital punishment, such as personal bias, ill-health, financial hardship, or peremptory challenges, §12.31(b) focuses the inquiry directly on the prospective juror's beliefs about the death penalty, and hence clearly falls within the scope of the Witherspoon doctrine."

Adams v. Texas, infra, 100 S.Ct. at 2528. (All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.)

by their oaths, the death penalty cannot be carried out. Witherspoon v. Illinois, supra, at 522, n. 21. . . ." Adams, supra, 100 S.Ct. at 2527.

And on what basis has the Court drawn the "line of neutrality," the point at which the State's "legitimate interest" ends, and the point past which execution of the death penalty "cannot be carried out?" As seen by the Court, the constitutional stakes are high:

> "In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.
>
> It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' [Citations omitted] It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out IF the jury that imposed or recommended it WAS CHOSEN BY excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. NO DEFENDANT can constitutionally be put to death at the hands of a tribunal SO SELECTED." 4/

Witherspoon at 521-523.

In short, the State - having no "legitimate interest" beyond obtaining a capital jury which will follow the law and abide by the juror's oath - is prohibited from employing any method of selection which operates to exclude jurors for cause on a broader

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4/ Observing that Witherspoon's jury had "not been shown" to be "biased" with respect to the verdict of guilt, the Supreme Court characterized as "self-evident" the fact that "in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which [Witherspoon] was entitled under the Sixth and Fourteenth Amendments. [Citations omitted]." Witherspoon at 518.

criterion, because the Sixth Amendment forbids the result: "a tribunal, organized to return a verdict of death;" "a jury uncommonly willing to condemn a man to die."

The Supreme Court has provided a great deal of guidance to assist the states with their burden of implementing constitutional methods of juror selection in capital cases.[5/] But the burden of effectuating the Witherspoon doctrine ultimately falls upon the states, including the legislatures and courts as well as those involved in prosecution. Not only the capital defendant has a great stake in the method of selection employed to obtain his jury:

> "If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion."

Witherspoon at 522, n. 21.

Thus, in Texas, the death penalty is not only vacated, but by virtue of Article 37.07, §3(c), V.A.C.C.P., a new trial is required in every case in which the "voir dire testimony. . .

5/ The State has a "valid interest" in excluding: (1) "prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon at 513; (2) "those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them." Witherspoon at 514; (3) "veniremen who. . . made it unmistakably clear [a.] that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or [b.] that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." [Emphasis original] Witherspoon at 522, n. 21; Adams, 100 S.Ct. at 2525; (4) "those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths." Adams, 100 S.Ct. at 2529; (5) those who are "so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme." Adams, 100 S.Ct. at 2529.

indicates that veniremen were excluded on any basis broader" than that delineated by Witherspoon.

In Witherspoon, the State's jury selection method was condemned because prospective jurors who stated they did not believe in the death penalty were excused "without any attempt to determine whether they could nonetheless return a verdict of death;" those who admitted having conscientious scruples against the death penalty were excused "without any effort to find out whether their scruples would invariably compel them to vote against capital punishment." Witherspoon at 514-515.

The Witherspoon doctrine, said the Supreme Court in Adams, "is not a ground for challenging any prospective juror," and it thought "this point may seem too obvious to bear repetition." But, it did repeat the point because the Court had noted "frequent references to Witherspoon as a ground for 'disqualifying prospective jurors,'" and it found that "the State, and the Texas Court of Criminal Appeals, might have fallen into the error of assuming that Witherspoon and §12.31(b) are both grounds for exclusion," explaining in the next paragraph how §12.31(b) may lead to "exclusions forbidden by Witherspoon."[6/]

6/ Hovila v. State, 532 S.W.2d 293 (Tex.Cr.App. 1975) reflects just such an understanding of the Witherspoon doctrine, whereas Boulware v. State, 542 S.W.2d 677 (Tex.Cr.App. 1976) in overruling Hovila, id. at 683, did not. Adams alludes to Hovila favorably; it is omitted from the list of seven opinions perceived by the Supreme Court to indicate the Court, as previously constituted, might have fallen into error. Adams, 100 S.Ct. at 2527, 2528, n. 6. On the other hand, Boulware, supra, is relegated to a single mention in the solitary dissenting opinion of Justice REHNQUIST. This poetic justice is not lost on the writer.

Thus in my view, the burden on this State is clear: the voir dire examination of each juror must reflect an "inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases," [7] in order to show that "the jury-selection standards employed [have not] undermined 'the very integrity of the. . . process.'" [8] Witherspoon at 523, n. 22, quoting Linkletter v. Walker, 381 U.S. 618, 639, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

7/ Witherspoon at 515, n. 9.

8/ Judge Onion (now Presiding) fully grasped the import of Witherspoon as regards the burden placed thereby upon the State in Harris v. State, 457 S.W.2d 903 (Tex.Cr.App. 1971) when he wrote:

> "Before prematurely challenging for cause a prospective juror who has only affirmatively answered the so-called statutory question, prosecutors should go beyond such initial expression of 'conscientious scruples' or disclaimer of belief in capital punishment to clearly ascertain and establish that the prospective juror would automatically vote against the death penalty in any case regardless of the facts, could never vote for or consider its imposition in any case irrespective of the evidence, could not abide by the existing law and would not follow the trial court's instructions, could not assess such penalty in the particular type of case at bar, etc.
>
> If the defense counsel with or without interrogation indicates there are no further questions, it may be well for the court to inquire if such action means that the defense is not opposing the challenge for cause, or if the defendant personally and his counsel are affirmatively [satisfied that the juror is impartial], and make sure such colloquy is made part of the record."

457 S.W.2d at 911-912. Accord: Grider v. State, 468 S.W.2d 393, 398-399 (Tex.Cr.App. 1971).

While the disposition in Harris, supra, was subsequently reversed by the United States Supreme Court in Harris v. Texas, 403 U.S. 947, 91 S.Ct. 2291, 29 L.Ed.2d 859 (1971), we are safe in assuming that the reversal did not implicate the language quoted above.

There are those, however, who believe that the "serious prejudice" dealt capital defendants by a "State's practice" [9] which "crosse[s] the line of neutrality" and "produce[s] a jury uncommonly willing to condemn a man to die," may be waived by the defendant should he fail to object. Anomolous as this notion is, insult is heaped on injury when the only justification cited for it is the Supreme Court's vacating for further consideration in light of Adams two California Supreme Court judgments reversing capital murder convictions.

The majority implies that the United States Supreme Court granted certiorari on the second question [10] presented in both California v. Velasquez, 100 S.Ct. 3042 (1980) and California v. Lanphear, 101 S.Ct. 57 (1980), then remanded the causes for further consideration in light of Adams, because the latter, in laying the factual setting, stated jurors had been excused

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9/ In snyopsizing its decision in Witherspoon, the Supreme Court observed that "[t]he State was held to have no valid interest in such a broad-based rule of exclusion. . . . * * * The defendant, on the other hand, was seriously prejudiced by the State's practice." Adams, 100 S.Ct. at 2525.

10/ In Velasquez, supra, the second question presented was,

"(2) was alleged Witherspoon error in this case waived by defense's failure to object?"

27 CrL 468.

In Lanphear, supra, the virtually identical second question presented:

"(2) was alleged Witherspoon error in this case waived by failure of defense to object?"

27 CrL 4155.

"over petitioner's objection." In the realm of speculation it is far more likely, however, that the Supreme Court's concern with People v. Velasquez, 606 P.2d 341 (Cal. 1980) and People v. Lanphear, 608 P.2d 689 (Cal. 1980), focused on the excessively literal and dogmatic application of the Witherspoon doctrine insisted upon by the California Supreme Court, which not merely prejudices, but obliterates "the State's legitimate efforts to administer its constitutionally valid death penalty scheme."[11/]

11/ In Velasquez and Lanphear, the first questions raised by the State of California in its petitions for writ of certiorari, respectively, were:

> "(1) May prospective juror be removed for cause under Witherspoon v. Illinois when he states that there might be hypothetical case in which crime was so heinous that death penalty could be considered but that he has not been able to think of hypothetical of that nature?"

27 CrL 4068.

> "(1) May prospective juror be removed for cause under Witherspoon v. Illinois if trial judge has described each of separate decisions regarding guilt, special circumstances, and penalty to be made by juror, and juror states that he does not think he could participate in deliberations which might lead to the death penalty."

27 CrL 4155.

The Supreme Court of California had, of course, reversed the convictions in Velasquez and Lanphear because such jurors were excused, holding that Witherspoon permits exclusion only if "automatic opposition" to the death penalty is made "unmistakably clear."

If obscured in the past, the opinion in Adams leaves no room for speculation as to the State's "legitimate interest" in capital voir dire. See n. 5, ante.

Adams, 100 S.Ct. 2529.

More than an asserted proposition of law, I sense in the conjectural resort to California v. Velasquez, supra and California v. Lanphear, supra, a touch of hostility toward the United States Supreme Court for its failure to draw a black and white pictograph telling the State courts of last resort that being given the death penalty by a "tribunal organized to return a verdict of death" constitutes harm to an accused per se, harm of such a fundamental nature that the presence or absence of an objection by the defense is inconsequential. This wait-and-see attitude is a sad departure from the care with which this Court meets its onerous responsibilities. How many more of capital murder convictions will ultimately be reversed as a direct result of such an untenable application of §12.31(b), supra, vis-a-vis Witherspoon, recently rectified by Adams? To what extent shall we go in adding to the list of decisions already faulted?

This Court is fully capable of an independent, dispassionate reading and analysis of the numerous authorities on the subject,[12/] motivated only by the welfare of the criminal justice process in

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12/ Of course, no objection was voiced in Witherspoon itself, nor in Maxwell v. Bishop, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970); and in Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969) the defense actually asserted to exclusions, as did the defense in State v. Wigglesworth, 243 N.E.2d 607 (Ohio 1969) [holding defendant waived Witherspoon error], reversed per curiam in Wigglesworth v. Ohio, 403 U.S. 947, 91 S.Ct. 2284, 29 L.Ed.2d 857 (1971). See also Harris v. State, 457 S.W.2d 903 (Tex.Cr.App. 1970) [holding that Witherspoon error was waived by failure of defense to object], reversed in Harris v. Texas, 403 U.S. 947, 91 S.Ct. 2291, 29 L.Ed.2d 859 (1971). In Davis v. State, 230 Ga. 804, 225 S.E.2d 241, the objection was found "insufficient," but still the voir dire examination was held constitutionally inadequate, id. at 244.

this State and the integrity of the law. It requires no extraordinary insight to conclude that, given Witherspoon error cannot be "harmless,"[13/] neither can it be "waived" by a failure to object. But like one who stands with his back to the street because no one told him the parade is passing by, the majority indulges a delusion that liability for the barrage of reversals it ensures today lies elsewhere; in truth it lies only here.

I dissent.

CLINTON, Judge

(Delivered April 15, 1981)

EN BANC

Teague, J. joins

13/ Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976) [holding that the lack of systematic, intentional exclusion of a qualified group of jurors is not the determining test, but rather, whether "a venireman is improperly excluded," and if so, "any subsequently imposed death penalty cannot stand]."

See also Witherspoon at 523, n. 22, wherein the Supreme Court stated:

> ". . .[W]e think it clear, . . . that the jury-selection standards employed here necessarily undermined 'the very integrity of the. . . process' that decided the petitioner's fate, . . . and we have concluded that neither the reliance of law enforcement officials. . . nor the impact of a retroactive holding on the administration of justice . . . warrants a decision against the fully retroactive application of the holding we announce today." [Citations omitted]